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No. 88-626

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,
v.
DALE L. HODDER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

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November 10, 1988

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MOTION OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION

Pursuant to Rule 36 of the Rules of this Court, The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), Product Liability Advisory Council, Inc. ("Advisory Council"), and National Association of Manufacturers of the United States of America ("NAM") request leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has withheld consent.

MVMA is a trade association whose member companies build motor vehicles and manufacture industrial, lawn, and agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, and gasoline and diesel engines for various industrial and agricultural uses.

The Advisory Council is an association of industrial companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability.

NAM is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

The most comprehensive impartial analysis of jury verdicts in the United States in the last two decades shows that business activities by manufacturers such as those who constitute the memberships of MVMA, the Advisory Council, and NAM have borne the brunt of a massive and discriminatory increase in the frequency and size of punitive damages verdicts. Researchers for the RAND Institute for Civil Justice have concluded that "[c]orporate defendants are in fact more likely than individuals or public agencies to be the target of [punitive damages] awards" and that "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* iii, 50 (1987).* Even more disturbing is that "[j]uries also award more money

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* The authorities cited in this motion are also cited in the accompanying brief. The location of these authorities within the brief can be determined by referring to the Table of Authorities.

when the defendants are institutions or organizations rather than individuals—the 'deep-pocket' effect. . . . [W]e can detect a separate, statistically independent effect for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

Thus, the members of MVMA, the Advisory Council, and NAM have suffered multi-layered, systematic discrimination at the hands of juries under the present system. Moreover, the wealth of manufacturing corporations appears to have affected even appellate review of punitive damages awards. The RAND researchers have stated:

> Considerations of . . . defendants' wealth might also affect judicial review of punitive damages. Our survey to determine final award disposition indicated that awards against business defendants were reduced less by post-trial actions than were awards against individuals. . . . [T]he results suggest that not only do business defendants have larger punitive awards assessed against them, but they are also likely to pay a greater portion of those awards.

M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* 53 (1987).

These studies confirm what the punitive damages award in this case demonstrates: By giving juries unfettered discretion whether to award punitive damages once a specified level of culpability is found, and by establishing neither a specified maximum of any kind nor objective standards by which the size of punitive awards are to be fixed at trial or reviewed on appeal, punitive damages laws in the great majority of the states have resulted in punishments that, both in frequency and in size, are discriminatory and disproportionate to the harm caused and to the culpability involved. Those laws directly impose on manufacturers, and indirectly impose

on consumers and workers, the burden of unnecessary, unjustified punishments.

Accordingly, MVMA, the Advisory Council, and NAM seek to submit this *amicus curiae* brief to assist the Court in evaluating the public importance and practical consequences of the punitive damages questions presented in the petition for a writ of certiorari. MVMA, the Advisory Council, and NAM respectfully request that their motion for leave to file the accompanying brief as *amici curiae* be granted for that purpose.

Respectfully submitted,

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Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1 (1982) 16
Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) 7

TABLE OF AUTHORITIES—Continued

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D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* (1987) 5, 14, 15

P. Huber, *Liability: The Legal Revolution and Its Consequences* (1988) 8

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M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* (1987) 11, 14

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INTEREST OF THE AMICI CURIAE

MVMA is a trade association whose member companies build motor vehicles and manufacture industrial, lawn, and agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, and gasoline and diesel engines for various industrial and

agricultural uses. The Advisory Council is an association of industrial companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. NAM is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. The interest of MVMA, the Advisory Council, and NAM in the punitive damages questions presented in the petition for a writ of certiorari is fully described in the accompanying motion for leave to file this brief as *amici curiae* in support of the petition.

PRELIMINARY STATEMENT

The opinion of the Supreme Court of Minnesota, reported at 426 N.W.2d 826 (Minn. 1988), states the following facts on which MVMA, the Advisory Council, and NAM rely in urging this Court to grant the petition for a writ of certiorari.

This product liability case arises out of injuries caused by a model-KWX tire rim manufactured by The Goodyear Tire & Rubber Company ("Goodyear") in 1955. At some time after the date of manufacture and sale, Goodyear learned that there was a danger of pressurized separation of that type of rim. *Id.* at 829. Accordingly, by the 1970's, Goodyear "was using safety films, posters, manuals, advertising, and promotion of OSHA standards to make known information on maintenance and repair of K-rims and to warn about dangers associated with misassembly or use of worn parts." *Id.* The plaintiff, Dale L. Hodder ("Hodder"), however, did not receive any of Goodyear's post-sale warnings. *Id.* In 1981 Hodder was injured when the KWX rim that he was mounting explosively separated under pressure. *Id.*

The jury found that the KWX rim was not defectively designed, and Hodder did not claim that the rim had been defectively manufactured. The jury found Goodyear negligent, however, on the ground that Goodyear "knew or reasonably could have discovered the danger involved in the use of the KWX rim, and the KWX truck rim was not accompanied by adequate warnings." *Id.* at 832; App. D, 37a.[1] The jury awarded Hodder compensatory damages of $3,368,916 and punitive damages of $12.5 million. *Id.* at 829.

On appeal, Goodyear challenged both the liability verdict and the punitive damages verdict. In addressing the liability issue, the Minnesota Supreme Court observed that it had never before "had occasion to deal with" the question of whether under Minnesota tort law a manufacturer could be held liable for having failed to provide adequate warnings about a risk that was unknown when the product in question was sold. *Id.* at 833. The court further conceded that a comment to the Minnesota pattern jury instructions stated that, for the assessment of a manufacturer's obligation to keep informed of scientific knowledge and discoveries in its field, "the knowledge should be judged at the time the product in question is manufactured." *Id.*

Nevertheless, the court held that "in special cases" a duty to warn of risks discovered after a product has been marketed can arise. *Id.* The court also stated, "we think this is such a case." *Id.* One of the primary bases for that conclusion was that Goodyear had voluntarily disseminated a wide variety of post-sale warnings upon learning of the K rim risk and thereby had "undert[aken] a duty to warn." *Id.* The court then concluded that, despite Goodyear's voluntary dissemination of those warn-

[1] Citations in the form "App. —" refer to the appendices to Goodyear's Petition for Writ of Certiorari to the Supreme Court of Minnesota.

ings and instructions, the judgment of liability should be affirmed because the jury "could have found that Goodyear's warnings were inadequate to reach K-rim users." *Id.*

The court held that the punitive damages verdict of $12.5 million was improper, reasoning that Hodder's trial counsel had asked for $12.5 million based on the cost of recalling 250,000 K rims at a cost of fifty dollars each; that the jury had rejected any obligation to recall by finding the rims nondefective; and that the "conclusion is inescapable that the jury awarded [the specific sum of $12.5 million] on a theory the jury itself had rejected." *Id.* at 836. Rather than remanding for a new trial on punitive damages or on all issues, however, the court determined on its own that a punitive damages award of $4 million would be appropriate. The totality of the court's reasoning was as follows:

> In determining the reduction, we look for proportionality between the egregious misconduct and the amount of damages, keeping in mind "those factors which *justly bear* upon the *purpose* of punitive damages." Minn. Stat. § 549.20, subd. 3 (1986) (emphasis added). Here, first of all, the award must be substantially discounted for the erroneous per-rim recall calculation. Secondly, while the focus is on the dangerous propensity of the K-rim to explode, the egregious misconduct must, under the jury's findings, be restricted to the inadequacies of the warnings; the product itself, it must be remembered, was found not defective, neither in design nor manufacture, nor was there a complete failure to warn. It appears that the jury, in punishing the defendant, may have included factors not "justly bearing" on punitive damages. Finally, the purpose of punitive damages needs to be kept in mind, namely, to punish and deter the conduct found to be willfully indifferent to the safety of others. We conclude, in this case, that an appropriate punitive damages award should

be $4 million. The award, therefore, is reduced from $12.5 million to $4 million.

Id. at 837.

Goodyear challenged the $4 million punitive damages award as a violation of the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. The Minnesota Supreme Court rejected those challenges. It is these issues that MVMA, the Advisory Council, and NAM urge this Court to review.

REASONS FOR GRANTING THE PETITION

I. REVIEW BY THIS COURT OF THE CONSTITUTIONALITY OF PUNITIVE DAMAGES JUDGMENTS SUCH AS THE ONE IMPOSED BELOW IS NEEDED BECAUSE OF THE IMPORTANCE OF THE ISSUE TO MANUFACTURERS AND TO THE CONSUMING PUBLIC.

The most comprehensive impartial analysis of jury verdicts in the United States in the last two decades, an empirical study by the RAND Institute for Civil Justice, shows that the growth in the average award in the types of litigation that manufacturers regularly find themselves defending "has been truly explosive, reflecting increases ranging from 200 to more than 1,000 percent" in only two decades. D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 18 (1987). A primary element in that explosion has been the phenomenal increase in both the frequency and the size of punitive damages awards against manufacturers.

Before 1970, for example, there was only one reported appellate court decision upholding an award of punitive damages in a product liability case, and that was an award of $250,000. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Today, hardly a month goes by without a multi-million-dollar

punitive damages verdict against a manufacturer. *See, e.g., O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987) ($10 million punitive damages verdict), *cert. denied*, 108 S. Ct. 2014 (1988); *Kociemba v. G.D. Searle & Co.*, 16 Prod. Safety & Liab. Rep. (BNA) 893 (D. Minn. Sept. 19, 1988) ($7 million punitive damages verdict); *Ealy v. Richardson-Merrell, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 740 (D.D.C. Oct. 1, 1987) ($75 million punitive damages verdict, remitted to zero); *George v. Raymark Industries Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 865 (Del. Super. Ct. Nov. 9, 1987) ($75 million punitive damages verdict); *Masaki v. General Motors Corp.*, 16 Prod. Safety & Liab. Rep. (BNA) 225 (Haw. Cir. Ct. Feb. 29, 1988) ($11.25 million punitive damages verdict); *Kemner v. Monsanto Co.*, 15 Prod. Safety & Liab. Rep. (BNA) 884 (Ill. Cir. Ct. Oct. 22, 1987) ($16.25 million punitive damages verdict); *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) ($7.5 million punitive damages verdict); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. App. 1986) ($100 million punitive damages verdict, remitted to $10 million); *Roberts v. Seven-Up*, 16 Prod. Safety & Liab. Rep. (BNA) 466 (Utah Dist. Ct. Feb. 18, 1988) ($10 million punitive damages verdict, remitted to $375,000).

The effect of these massive punitive awards on American industry has been, and continues to be, devastating. At least two major American manufacturers have been driven into the bankruptcy courts by multi-billion-dollar punitive damages claims. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re A.H. Robins Co.*, 85 B.R. 373 (E.D. Va. 1988). Important health products have drastically risen in price or been withdrawn from the market altogether. *See Brown v. Superior Court*, 44 Cal. 3d 1049, 1064, 245 Cal. Rptr. 412, 421, 751 P.2d 470, 479 (1988) (discussing withdrawal of Bendectin from market after price increased by more than 300 percent; also discussing withdrawal of all but

two manufacturers of diphtheria-pertussis-tetanus vaccine, and price increase from eleven cents per dose to $11.40 per dose in four years); Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) (discussing drug manufacturers' refusal to supply influenza vaccine until Government assumed the risk of lawsuits resulting from injuries caused by the vaccine). Equally important new products have been withheld from introduction altogether. *See Brown v. Superior Court*, 44 Cal. 3d at 1065, 245 Cal. Rptr. at 421, 751 P.2d at 480 (discussing non-introduction of new drug for the treatment of vision problems because of unavailability of adequate liability insurance). American manufacturers have fallen behind in the development of major product groups. *See, e.g.*, Connell, *The Crisis in Contraception*, 1987 Technology Review 47 (statement by Elizabeth B. Connell, M.D., member of FDA Obstetrics and Gynecology Advisory Committee, that "the United States is losing its leadership role in this area [of contraceptive technology]—with potentially disastrous consequences for women and men in this country and elsewhere").

A less obvious effect of these Draconian punishments is that they spawn more frivolous lawsuits, prolong trials, and generate more appeals, all of which further disrupt the country's manufacturing activities. Moreover, the unpredictability of such awards makes it considerably more difficult for manufacturer-defendants and plaintiffs to evaluate cases for settlement.

The effect of these burdens on manufacturers has been felt as a "tax" on every product purchased by consumers:

> The tax accounts for 30 percent of the price of a stepladder and over 95 percent of the price of childhood vaccines. It is responsible for one-quarter of the price of a ride on a Long Island tour bus and one-third of the price of a small airplane . . . . [I]t adds more to the price of a football helmet than the cost of making it. The tax falls especially hard on

prescription drugs, doctors, surgeons, and all things medical.

P. Huber, *Liability: The Legal Revolution and Its Consequences* 3 (1988).

In sum, the unpredictability and magnitude of punitive damages awards against manufacturers is rapidly eroding the very foundation of our industrial base and is detracting from the health and comfort of the consuming public. There is an urgent need for this Court to decide whether the Constitution provides some level of protection against the arbitrariness and excessiveness of this system.

II. REVIEW IS URGENTLY NEEDED BECAUSE THE STATES HAVE FAILED TO ADDRESS THE SYSTEMIC INFIRMITIES THAT THIS COURT HAS SUGGESTED SHOULD BE ADDRESSED.

Twice in the last two years, this Court has suggested that the prevailing punitive damages system presents constitutional issues that need to be addressed. *See Bankers Life & Cas. Co. v. Crenshaw*, 108 S. Ct. 1645, 1651 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

In addition, in opinions spanning a period of almost twenty years, this Court has repeatedly expressed concern that the prevailing punitive damages system too readily enables juries to impose punishment based on prejudice and caprice. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages laws leave juries "free to use their discretion selectively to punish expressions of unpopular views") (Powell, J., joined by Marshall, Blackmun, & Rehnquist, JJ.); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979) ("punitive damages may be employed to punish unpopular defendants") (Marshall, J., joined by Brennan, Stewart, White, & Powell, JJ.); *Smith v. Wade*, 461 U.S. 30, 59 (1983) ("punitive damages are fre-

quently based upon the caprice and prejudice of jurors") (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting); *cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) ("Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award.") (Blackmun, J., joined by Burger, C.J., and Stewart, White, Powell, & Rehnquist, JJ.); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 74-75 (1971) (when punitive damages "bear no relationship to the actual harm caused, they then serve essentially as springboards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an "infinitely wide range of penalties wholly unpredictable in amount . . . . Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for the States to permit punitive damages that bear no discernible relationship to the actual harm caused") (Harlan, J., dissenting); *id.* at 84 ("This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others.") (Marshall, J., dissenting).

Nevertheless, few states have acted to cure the systemic infirmities that have led to the rash of arbitrary, excessive punitive damages awards described in section I of this brief. It is apparent that the matter will only worsen until this Court acts.

A. Review by This Court of the Constitutionality of Punitive Damages Judgments Imposed Pursuant to State Laws That Permit the Factfinder to Act Arbitrarily in Deciding Whether to Award Punitive Damages Is Urgently Needed.

The salient characteristic of the general punitive damages laws of Minnesota and most other states is that the jury is told only that it "may," in its discretion, impose

punitive damages in an amount "which will serve to punish and deter [the defendant] and deter others from the commission of like acts." App. J, 67a. *Accord, e.g.*, Illinois Pattern Jury Instructions: Civil 35.01 (2d ed. 1971); Pattern Instructions for Kansas 9.44 (2d ed. 1977); Missouri Approved Jury Instructions 10.01-6 (3d ed. Supp. 1987).

Moreover, punitive damages awards frequently are many times larger than the maximum criminal fines that can be imposed for the same or worse conduct, yet none of the procedural safeguards guaranteed to every criminal defendant is provided to punitive damages defendants. Indeed, in punitive damages cases the sentencer and the decider of "guilt" are one and the same, and that decisionmaker hears the sentencing evidence and the liability evidence in one proceeding.

These laws invite arbitrariness and invidious discrimination by factfinders, both in deciding whether to award punitive damages at all and in deciding what amount of punitive damages to award. *Cf. Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (proceedings in which factfinder has "unusual discretion" to weigh facts are "often vulnerable to judgments based on cultural or class bias" and require enhanced procedural safeguards).

In Minnesota, for example, upon finding "clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others," Minn. Stat. § 549.20(1) (1988), the jury may, in its unbridled discretion, choose to award or not to award punitive damages. The jury is told no factor that it may or may not consider in deciding whether to award punitive damages. Simply because one defendant is a Baptist or poor or an individual, rather than a corporation, a jury may choose not to award punitive damages. The same jury may choose to award punitive damages for the identical conduct by a defendant who is Catholic or wealthy or a corporation, rather than an individual. In fact, researchers for the RAND Institute for Civil Justice have

empirically determined that "[c]orporate defendants are . . . more likely than individuals or public agencies to be the target of [punitive damages] awards." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* iii (1987).

This case aptly demonstrates the extent of this anti-corporation prejudice. The Minnesota Supreme Court explicitly conceded that it had never previously considered whether a manufacturer who sells a nondefective product, and who later learns that the product can cause harm if misused, has a duty to warn of the newly discovered risk. *See* 426 N.W.2d at 832-33. The court further conceded that the applicable Minnesota jury instruction guide "seems to be drafted with time-of-sale warnings primarily in mind . . . ." *Id.* at 833. Thus, the court implicitly conceded that, when Goodyear manufactured and sold the rim in 1955, and even when Hodder was injured in 1981, Goodyear had no basis in Minnesota law for believing that there was any duty to warn of risks discovered after a product had been sold.

Even after considering the issue for the first time, the court decided that a post-sale duty to warn "arises only in special cases." *Id.* at 833. The court then weakly concluded, "We think this is such a case." *Id.* The court thus applied this very narrow duty, recognized for the first time in 1988, to a product that had been manufactured in 1955 and that had resulted in injury in 1981.

Moreover, one of the factors that caused the court to find that the post-sale duty to warn existed in this case was that Goodyear, upon learning of the risk presented by misuse of the K rims, had *voluntarily* chosen to "distribute[] warnings and instructions by means of safety films, posters, manuals, and advertising." *Id.* at 834. Thus, the only basis for liability, even for compensatory damages, was that the jury "could have found that Goodyear's [voluntary] warnings were inadequate to reach K-rim users." *Id.* at 834. The court emphasized that the

punitive damages "must, under the jury's findings, be restricted to the inadequacies of the warnings; the product itself, it must be remembered, was found not defective, neither in design nor manufacture, nor was there a complete failure to warn." *Id.* at 837.

Based on its conclusion that a legal duty had arisen in part because Goodyear had voluntarily chosen to warn and instruct about a nondefective product, and based on that newly announced duty, the Minnesota Supreme Court concluded that there was an adequate basis to sustain an award of punitive damages under the Minnesota standard of "willful indifference to the rights or safety of others." Minn. Stat. § 549.20(1) (1988).

The award of punitive damages under these circumstances brings sharply into focus the need for this Court's review of the discretionary punitive damages system. Due process requires that something be done promptly, because "a vaguely defined, elastic standard like 'reckless indifference' gives free reign to the biases and prejudices of juries." *Smith v. Wade*, 461 U.S. at 88 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting). Due process requires that something be done promptly, because juries cannot continue to be permitted to use prejudice and caprice to decide whether to impose devastating punishment in the form of punitive damages.

B. Review by This Court of the Constitutionality of Punitive Damages Judgments Imposed Pursuant to State Laws That Permit the Factfinder to Act Arbitrarily in Setting the Amount of Punitive Damages Is Urgently Needed.

Minnesota also does not tell the jury what factors may or may not be considered in deciding the amount of punitive damages to impose. The Minnesota statute merely states that the amount must be measured by "factors which justly bear upon the purpose of punitive damages, *including*" a specified list of disparate factors. Minn. Stat. § 549.20 (1988) (emphasis added).

No maximum award is specified by the legislature or by the courts. No specified relationship between the harm caused and the size of the punitive award is required. No proportion between the punishment imposed in one case for one type of wrongful conduct and the punishment imposed in other cases for other types of conduct is required. No relationship between the punishment imposed in one case for particular conduct and the punishment imposed in other cases for identical conduct is required. No instruction is given as to what must be considered or what must not be considered by the jury in determining the amount of punishment. No instruction regarding the deterrent and retributive functions of compensatory damages and defense costs is given.

Thus, unlike the fines specified in Minnesota statutes for every crime, no matter how trivial or how heinous, there is no fixed dollar maximum on the punishment that a jury may inflict by using punitive damages. *Compare, e.g.*, Minn. Stat. § 549.20 (1988) (no maximum punitive damages award) *with* Minn. Stat. § 609.20 (1988) (maximum fine of $30,000 for manslaughter in the first degree); Minn. Stat. § 609.221 (1988) (maximum fine of $20,000 for assault in the first degree); and Minn. Stat. § 609.21 (1988) (maximum fine of $10,000 for criminal vehicular operation resulting in death). Unlike the specific punitive damages awards authorized for violations of Minnesota's antitrust laws, workers' compensation laws, forcible eviction laws, attorney misconduct laws, trespass laws, and at least twenty-five other laws, punitive awards under the general punitive damages statute are not restricted to a specified multiple of the compensatory damages. *Compare, e.g.*, Minn. Stat. § 549.20 (1988) (no maximum specified multiple) *with* Minn. Stat. § 325D.57 (1988) (antitrust violations) (treble damages specified); Minn. Stat. § 176.82 (1988) (obstructing workers' compensation benefits) (treble damages specified); Minn. Stat. § 557.08 (1988) (forcible

eviction) (treble damages specified); Minn. Stat. § 226.06 (1988) (violation of provisions regarding warehouse certificates) (double damages specified).

The most comprehensive impartial analysis of jury verdicts in the United States in the last two decades shows that the result of the discretionary punitive damages system has been that businesses have borne the brunt of massive, discriminatory punitive damages verdicts. The same researchers for the RAND Institute for Civil Justice who found that juries are more likely to impose punitive damages against corporations than against individuals also found that "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* 50 (1987). Even more disturbing is that "[j]uries also award more money when the defendants are institutions or organizations rather than individuals—the 'deep-pocket' effect. . . . [W]e can detect a separate, statistically independent effect for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

Thus, manufacturers have suffered multi-layered, systematic discrimination at the hands of juries under the present system. Moreover, the wealth of manufacturing corporations appears to have affected even appellate review of punitive damages awards. The RAND researchers have stated:

> Considerations of . . . defendants' wealth might also affect judicial review of punitive damages. Our survey to determine final award disposition indicated that awards against business defendants were reduced less by post-trial actions than were awards against individuals. . . . [T]he results suggest that not only do business defendants have larger punitive

> awards assessed against them, but they are also likely to pay a greater portion of those awards.

Id. at 53.

Punishments imposed under these circumstances violate a fundamental tenet of American law, a tenet that this Court has cogently summarized in another context:

> Juries are invariably given careful instruction on the law and how to apply it before they are authorized to decide the merits of a lawsuit. *It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. . . . It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.*

Gregg v. Georgia, 428 U.S. 153, 192-93 (1976) (discussing detailed statutory guidelines provided for jury and for reviewing court to decide whether to impose capital punishment) (emphasis added).

Because punitive damages imposed under these circumstances are not based on any articulated or identifiable standard, they are "excessive" under both of the tests used by this Court in determining the constitutionality of punishments under the Eighth Amendment. The first such test holds that a "punishment is excessive . . . if it is unnecessary." *Furman v. Georgia*, 408 U.S. 238, 279, 331 (1972) (Brennan & Marshall, JJ., concurring). *Accord Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion). The second is that punishments must be proportionate to the wrongs committed. *See Solem v. Helm*, 463 U.S. 277, 284-86 (1983); *Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion).

Punitive awards imposed pursuant to standardless jury submissions violate the first of these tests because those punishments serve no valid state interest. This Court has already declared that "states have no substantial inter-

est in securing for plaintiffs gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Specifically, neither deterrent nor retributive goals can properly be served by standardless punitive awards.

The theory of deterrence assumes that the person to be deterred will rationally weigh the benefits and costs (including the possible punitive sanctions discounted by the probability of their being imposed) likely to flow from contemplated wrongful conduct. Proper deterrence obtains, therefore, only if actors are informed about the magnitude of the costs, including punishments, that they are likely to incur if they engage in that conduct. When juries are allowed to award punitive damages pursuant to laws that establish no standards, the actor contemplating wrongful conduct can only guess at the likely consequences.

Proper deterrence also requires that punishment be imposed in the amount, and only in the amount, needed to ensure that the actor's expected costs (that is, actual costs adjusted upward to account for the probability that the conduct will not be detected and successfully prosecuted by injured persons), including punishments, equal any wrongful gain that he would otherwise expect to obtain from the wrongful conduct. *See* H. Packer, *The Limits of the Criminal Sanction* 45-48 (1968); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 23-34, 43-53 (1982); Note, *Punitive Damages For Libel*, 98 Harv. L. Rev. 847, 849-51 (1985). Any other punishment will either overdeter or underdeter. Therefore, if punishments actually imposed have not been required to reflect this limitation, the punished defendants and other actors will see the absence of the required relationship and will be either overdeterred or underdeterred in the future.

Punitive awards imposed pursuant to standardless jury submissions also fail to serve the state's retributive purposes. The basic test of the propriety of a punishment as retribution is that the punishment must be proportionate to the wrongdoing. *See* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 846 (1972). This is also the second test for excessiveness of punishments articulated by this Court. *See* p. 15, *supra*. Punitive damages imposed pursuant to standardless jury submissions violate the proportionality requirement in two respects.

First, the punitive award imposed in a particular case for a particular act will be disproportionate if it is not approximately the same as the punitive awards imposed in other instances for similar acts. If there is no fixed maximum of any kind on punitive damages awards, and if juries are not told what other punitive awards have been imposed for similar acts and that their award should not substantially differ, disproportionality will result.

Second, punishment imposed for one form of wrongdoing will not be properly proportioned unless it is less severe than the punishments imposed for more serious forms of wrongdoing and is more severe than the punishments imposed for less serious forms of wrongdoing. Again, however, if proportioned maxima have not been established beforehand to limit juries' awards for various forms of wrongdoing, and if juries are not instructed as to what punishments have been imposed for different forms of wrongdoing and that the punishment they impose must be appropriately proportioned, the relationships between punishments and wrongful acts from case to case will be purely fortuitous. Disproportionality will necessarily result.

Neither of these problems infects criminal sentencing or civil fines in the manner that these problems infect jury-imposed discretionary punitive damages awards. Legislatures establish maximum criminal fines, prison

terms, and civil fines and thereby establish proportionality between punishments and wrongs in advance. In addition, the judges who impose criminal sentences and civil fines are aware of the legislatively established proportions. The judges also do not impose a sentence or fine in one case without the benefit of knowing what sentences or fines have been imposed in both similar and dissimilar cases.

Juries imposing discretionary punitive damages have none of these guides or restraints. They exercise uninformed license based on the emotion of the case before them.

In sum, the prevailing punitive damages system has resulted in multi-million-dollar punishments vastly exceeding legislatively specified criminal punishments and civil fines for comparable and more culpable conduct; the system has created not just the risk, but the actuality, of erroneous deprivations, as demonstrated by the Minnesota Supreme Court's remittitur in this very case; and the states' purposes of retribution and deterrence are disserved by this system. This is precisely the type of situation in which the Due Process Clause requires heightened procedural safeguards. *Cf. Matthews v. Eldridge*, 424 U.S. 319 (1976) (identifying three-part test for determining required level of procedural protection); *see generally* Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 Va. L. Rev. 269 (1983). But the states have continued to withhold them and are likely to continue to do so until this Court requires otherwise.

CONCLUSION

There is an urgent need for the states to "replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing [punishment]." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (capital punishment case). This Court should grant the petition for a writ of certiorari and review the prevailing punitive damages laws to determine whether the Eighth and Fourteenth Amendments require as much.

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